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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 996

STERLING NATIONAL BANK OF DAVIE, PETITIONER

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT COMPTROLLER OF THE CURRENCY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 431 F.2d 514. The oral opinion of the district court (App., *infra*, pp. 11-14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1970. The petition for writ

of certiorari was filed on November 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether submission of a few newspaper articles by applicants for a new national bank charter, which were not shown to opponents of the bank, invalidated the granting of the charter by the Comptroller of the Currency.

2. Whether the Comptroller must make written findings prior to approving an application for a new bank charter.

STATEMENT

This action was brought by petitioner, the Sterling National Bank of Davie, in the United States District Court for the Southern District of Florida, attacking the authorization by the Comptroller of the Currency of a new national bank in Davie, Florida.

In May 1968, an application for permission to organize the new national bank was filed with the Comptroller, supported by a lengthy summary of information regarding the economic and demographic characteristics of the area to be served (AR 360-497).[1] A national bank examiner was assigned to investigate the application. As is the customary

[1] "AR" refers to the administrative record filed in support of the Comptroller's motion for summary judgment in the district court.

practice of the Comptroller's Office, petitioner and all other banks in the general area were notified and afforded the opportunity to comment upon the application (AR 328-348). Petitioner's office was located two miles from the proposed site of the new bank; all other banks in the area were located 6.8 to 8.3 miles from that site (AR 3, 37).

The national bank examiner inspected the area, interviewed bankers, businessmen, and shoppers, and inquired into the character, financial circumstances and banking experience of the organizers, and submitted a comprehensive investigation report (AR 61-72). He viewed the growth potential of the area as "excellent," but thought that its present development was not yet sufficient to warrant a new bank (AR 61, 64).

At the request of petitioner and other protesting banks, a hearing upon the application was held by the Regional Administrator of National Banks. All the economic evidence submitted by the applicants was available for inspection by the protestants prior to the hearing (hearing tr. 4).[2] At the hearing, both applicants and protestants had the opportunity to present witnesses and question each other's witnesses. The 331 page transcript of that hearing was made

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[2] The only information not made available to protesting banks was biographical and financial information concerning the organizers, such as their net worth, employment history, character and reputation (see, *e.g.*, the forms at AR 43-44). Petitioner has made no argument in this Court, or in the courts below, that such material should have been made available to it.

part of the administrative record. The Regional Administrator recommended against the granting of the charter.

Thereafter, the administrative file, consisting of approximately 800 pages of material concerning all aspects of the application, was sent to Washington, where it was reviewed by various officials in the Comptroller's office. After this extensive file had been transmitted to Washington, the applicants mailed in on six occasions newspaper articles, characterized by the district court as "of the most innocuous kind" (App., *infra*, p. 13). These articles (AR 9-33) generally stated, as the national bank examiner had noted, that (*e.g.*) "Broward County Economy is Outranking Rest of Nation" (AR 71), and "County Continues Rapid Expansion" (AR 33). Most of them described the generally booming Broward County economy; a few mentioned specific events in the vicinity of Davie, stating, for example (AR 18), that over a period of 20 years the Davie-Plantation area would gradually emerge as the largest city in the county, and that the value of building permits issued in Davie had risen from $40,500 in January 1968 to $847,600 in January 1969 (AR 22). These few published articles, although made part of the administrative record, were not specifically brought to the attention of petitioner.

After reviewing the file, the Director of the Bank Organization Division recommended disapproval of the application, on the ground that there was no showing of a "strong or marked degree of need for competition and service" (AR 39). Other officials

in the Comptroller's Office, however, took a more favorable view. A senior economist, David G. Hayes, criticized the basis of the adverse recommendations of the examiner and Regional Administrator. He noted (AR 75) that they apparently had given little weight to complaints of petitioner's depositors about the quality of its services,[3] and to the fact that many persons in the area were banking many miles from Davie. He added that while the applicants' projections for the area may have been overstated, nonetheless all concerned seemed to be in agreement with the examiner's statement that the area would "experience good growth in the years ahead." Moreover, he noted that the protestants had not answered specific contentions of the applicants (*e.g.*, AR 101-102) regarding indicators of forthcoming economic expansion, such as the establishment of definite plans for construction of 3,450 dwelling units in the proposed service area within the next two years. Mr. Hayes thought that further information should be obtained before a recommendation was made on the application (AR 39, 75).

In April 1969, the Deputy Comptroller recommended approval of the application (AR 2-3). He noted that petitioner, the nearest bank, was two miles away, and had had good growth in deposits, despite internal management difficulties. He added that "this market has a good potential and development

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[3] The national bank examiner, after interviewing local businessmen, stated: "It was something of a surprise to hear the many complaints made about the poor service offered by the Sterling National Bank of Davie" (AR 68-69).

is occurring at a steady pace." This new competition should be "reasonable and healthy," and should not adversely affect petitioner.

The same day, the Comptroller gave preliminary approval to the application (AR 1, 39),[4] but did not write a separate opinion.

The district court granted summary judgment for respondents. In an oral opinion, the court found, *inter alia*, that the newspaper articles submitted by the applicants were "of the most innocuous kind" (App., *infra*, p. 13) and that there was ample evidence to support the Comptroller's authorization of the new bank charter (App., *infra*, p. 14). The court of appeals affirmed, rejecting petitioner's contentions that submission of the newspaper articles invalidated the Comptroller's action as, in its view, the Comptroller was clearly authorized by the National Bank Act to consider such material (Pet. App. 5). The court also rejected the contention that the Comptroller was required to make formal findings prior to authorizing the new bank charter (Pet. App. 5-6).

ARGUMENT

1. Petitioner was given full access to the application for a new bank charter and supporting submissions, was granted a two-day hearing at its request

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[4] After the Comptroller's preliminary approval of a charter application, the applicants must meet certain formal filing requirements, and any conditions imposed by the Comptroller's office (there were none imposed here, see AR 39), before final authorization to commence business is given.

and was given the opportunity to present its own economic evidence. Neither the underlying statute or due process concepts precluded the Comptroller from also considering the newspaper articles the applicants had submitted; such considerations did not deprive petitioner of any substantial right.

The provisions of the National Bank Act governing the chartering of national banks, 12 U.S.C. 21-27, give the Comptroller discretion to investigate applications in whatever manner he deems appropriate. Thus, 12 U.S.C. 26 provides that "the comptroller shall examine into the condition" of a national banking association, ascertain the amount of capital stock and determine generally "whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking." 12 U.S.C. 27 provides that (emphasis added):

> If, upon a careful examination of the facts so reported [by the organizers, see 12 U.S.C. 26], *and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise*, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate * * *.

When the Comptroller's procedures were reviewed in 1940 by the staff of the committee which eventually drafted the Administrative Procedure Act, it concluded that the investigatory procedure was more

appropriate for obtaining information concerning bank charter applications than would be a formal hearing procedure. Monograph of the Attorney General's Committee on Administrative Procedure, Part 13, Federal Control of Banking, S. Doc. No. 186, 76th Cong., 3d Sess. pp. 9, 12. The fact that the Comptroller has in recent years greatly broadened the opportunity for competing banks to oppose applications for new banks, does not limit his authority to consider whatever pertinent information is submitted to him.

The inclusion of a few newspaper articles submitted by the applicants did not vitiate the overall fairness of the proceeding and would not require reversal of the Comptroller's decision even had the Comptroller's action been taken in a more formal administrative proceeding. See *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 309 F.2d 238, 241 (C.A. D.C.); cf. *Courtaulds (Alabama) Inc.* v. *Dixon*, 294 F.2d 899, 904-905, n. 16 (C.A.D.C.); compare *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (C.A.D.C.).

2. Neither the governing statute, 12 U.S.C. 21-27,[5] nor the Administrative Procedure Act, 5 U.S.C. (Supp. V) 500, *et seq.*, requires the Comptroller to make formal findings prior to the authorization of a new bank charter. The requirement in the Administrative Procedure Act that certain decisions contain findings and conclusions on the material issues, 5 U.S.C.

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[5] When the relevant provisions of the National Bank Act were enacted in 1864, a proposed amendment which would have required the Comptroller to state reasons for charter denials was defeated. Cong. Globe, 38th Cong., 1st Sess., p. 1341 (1864).

557(c)(3), applies only "when a hearing is required to be conducted in accordance with section 556 of this title." 5 U.S.C. 557(a). Hearings in accordance with Section 556 are required in cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. 554(a). But no such hearing is required on bank charter applications. *E.g.*, *Webster Groves Trust Co.* v. *Saxon*, 370 F.2d 381, 384-386 (C.A. 8).[6] In any event, the Comptroller's ranking subordinate, the Deputy Comptroller, did write a memorandum stating in some detail his reasons for recommending approval.[7]

3. Petitioner's final argument that the Comptroller's procedures violate due process of law,

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[6] While not specifically challenging the ruling below that there was ample evidence to support the granting of a charter at the location in question, petitioner, in its statement of the case, characterizes Davie as a "relatively static community" and asserts that the new bank location is "a loser bank location" (Pet. 4). Such characterizations are sharply disputed; there was ample evidence to the contrary before the Comptroller. As the national bank examiner pointed out (AR 61), for example, a growing educational complex located only a few blocks from the proposed bank site was to have 6500 students and 380 faculty members in 1969.

[7] In large part the petition relies upon cases (*e.g.*, *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80) involving formal administrative proceedings in which findings are expressly required by statute. Petitioner also relies (Pet. 17-18) upon a critique in the dissenting opinion in *First Natl. Bank of Smithfield* v. *Saxon*, 352 F.2d 267 (C.A. 4), of practices of the Comptroller's office. That critique, however, dealt with practices which no longer are followed. See Bloom, *Hearing Procedures of the Office of the Comptroller of the Currency*, 31 Law & Contemp. Problems 723 (1966).

based on its attempt to equate the position of a bank seeking to prevent competition with that of a welfare recipient cut off from his only source of income (*Goldberg* v. *Kelly*, 397 U.S. 254) is insubstantial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1971.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 69-654-Civ-TC

STERLING NATIONAL BANK OF DAVIE, a national banking association, PLAINTIFF

v.

WILLIAM B. CAMP, Comptroller of the Currency, ET AL., DEFENDANTS

Miami, Florida

January 12, 1970

FINDINGS AND CONCLUSIONS

THE COURT: The Court finds and concludes that the plaintiff does have standing to bring this suit and that the Court has jurisdiction.

The administrative file, with certain exceptions, is before the Court. The omissions, as I believe I recited in one of my earlier orders on some discovery questions, in the main are not matters that the plaintiff is entitled to in any event and we can say, therefore, that a hearing has been held, that the plaintiff has had ample opportunity to present his position there.

The two procedural questions raised by the plaintiff which he contends have resulted in denial of due process to him are, first, the question of failure of the comptroller to enter a written or formal findings. In the pleadings the plaintiff refers to the Rule. I am assuming that the Rule here is the one which ap-

pears in Title 5 at Section 555(e). If there is another rule I would like to have it cited to me. That is the one I find. It reads "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding."

Is that the one, Mr. Kenny?

MR. KENNY: Your Honor, that is the section of the Administrative Procedure Act which was specifically referred to and we believe it was our position in the pleadings, as correctly interpreted by the Court, that the denial of our formal protest was an outcome, a finding, a determination within the meaning of that Rule.

THE COURT: I do not think I have made such a determination. If I have I want to state my position on it at this time.

The second sentence of 555(e) reads:

> "Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."

Now the petition here under consideration is the petition of the new bank, that is, the petition for new bank charter, and the petition filed by the Sterling National Bank was simply a petition in opposition to it. The section of the Rule just read provides that the administrative officer must give a brief statement of grounds when he denies a petition. It doesn't say when he grants one. If it were intended that you could file a negative petition, that is one in opposition, and then get a ruling, accompanied by grounds on that negative petition, then it frustrates the terms in which this Rule was written. On the

other hand, although this is my belief of the intent of this Rule, if that is not correct, nevertheless the notice, that is, the grounds need not be given when the denial is self-explanatory.

Well, here the petition was granted thus holding that the need and convenience of the public would be served by granting the petition of those who sought the new national bank charter. It therefore seems evident that the denial or refusal to grant the opposing petition is obvious, that is, it is the reverse of that. It seems to me that is the sense of 555(e).

The other procedural defect was the question of ex parte communications. Well, the procedure by which the Comptroller makes his investigations and arrives at a decision on whether or not to grant a bank charter is founded in the main on unilateral investigatory procedures within the department. This is the principal protection that the public has, that bank charters not be indiscriminately issued and that banks not be chartered where there is no convenience and necessity served. So that by its very nature the actions of the Comptroller are ex parte.

The showing that has been made here in the file with respect to the applicant's ex parte representations are of the most innocuous kind. It is my view that there has been no denial of due process by reason of ex parte communications, unilateral investigations by the Comptroller nor by the failure of the Comptroller to make formal written findings nor by any failure to afford the Sterling National Bank its opportunity to present its case. One or more cases flately hold that formal written findings are not required.

With respect to the scope of review of the Comptroller's actions, that is on the merits of the showing of convenience and necessity, of course it is not even

the substantial evidence rule but rather it is a review which is intended to assure that the Comptroller's acts are not arbitrary, capricious nor otherwise contrary to law. The administrative file which is here before the Court is replete with evidence which would support either view. The Comptroller decided that it supported the convenience and necessity of the new bank.

So it is the view of the Court that there are no genuine issues of material fact and that a summary judgment should be entered for these defendants.

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